

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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YUGEN KAISHA, Y.K.F.,	)	No. 08-0225 SC
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING IN
	)	PART AND DENYING IN
	)	PART PLAINTIFF'S
STEPHANIE DODSON,	)	MOTION TO STRIKE, AND
	)	GRANTING PLAINTIFF'S
Defendant.	)	MOTION FOR
	)	PRELIMINARY
_____	)	<u>INJUNCTION</u>

**I. INTRODUCTION**

Plaintiff Yugen Kaisha, Y.K.F. ("Plaintiff" or "YKF") filed this action to set aside an allegedly fraudulent conveyance under 11 U.S.C. §§ 544(b) and 548, and California Civil Code §§ 3439-3439.12. Two motions are pending before this Court. First, YKF moves to strike Stephanie Dodson's ("Defendant" or "Dodson") demand for a jury trial, or in the alternative, to bifurcate proceedings. Docket No. 37 ("Motion to Strike"). Dodson has filed a memorandum in opposition. Docket No. 48 ("Dodson Opposition"). Attorney Martin F. Triano, dba Law Offices of Martin F. Triano ("Triano") also filed a memorandum in opposition. Docket No. 44 ("Triano MTS Opposition"). YKF filed a reply to both memoranda of opposition. Docket No. 52 ("YKF MTS Reply").

Second, YKF moves for a preliminary injunction. Docket No.

33 ("MPI"). Dodson has filed a Statement of Non-Opposition to this motion. Docket No. 47 ("Dodson Non-Opposition"). Triano has filed a limited opposition. Docket No. 40 ("Triano PI Opposition"). YKF filed a reply to the Triano PI Opposition. Docket No. 50 ("YKF PI Reply"). Having considered all of the parties' submissions, the Court hereby GRANTS IN PART AND DENIES IN PART YKF's Motion to Strike. The Court GRANTS YKF's Motion for Preliminary Injunction.

## II. BACKGROUND

### A. YKF's Fraudulent Conveyance Claims

YKF originally filed an action for the fraudulent conveyance of stock in the Bankruptcy Court of the Northern District of California. Yugen Kaisha, Y.K.F. v. Dodson, Adversary Docket No. 07-3104 (Bankr. N.D. Cal.).<sup>1</sup> YKF's claims arise out of the transfer of 3,744,000 shares of common stock in Smart Alec's Intelligent Food, Inc. ("Smart Alec's") from Alexander Popov ("Popov") to his then-girlfriend, Dodson. Adv. Docket No. 1 ("YKF Complaint") at 2. Popov and Dodson are now married. Id. Popov filed for personal bankruptcy on September 5, 2005. See In re: Popov, No. 05-32929 (Bankr. N.D. Cal. 2005).

The transfer of shares took place some time before Popov filed for bankruptcy, but the date of the transfer is in dispute. Dodson claims that the transaction took place in April of 2004.

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<sup>1</sup> Citations to documents from the underlying adversary proceeding, Yugen Kaisha, Y.K.F. v. Dodson, Adversary Docket No. 07-3104 (Bankr. N.D. Cal.), will appear in the form "Adv. Docket No. XX."

1 Adv. Docket No. 6 ("Dodson Answer") at 2. YKF alleges that it  
2 took place in August of 2005, roughly a month before Popov filed  
3 for personal bankruptcy. YKF Complaint at 2. Dodson paid Popov  
4 \$12,500 for the shares. Id. at 3. YKF alleges that this transfer  
5 was fraudulent, and motivated by an intent to hinder and defraud  
6 Popov's creditors. Id.

7 On August 1, 2007, YKF purchased from the Chapter 7 Trustee  
8 the rights, claims, causes of action, and remedies of the Trustee  
9 and the Debtor's Estate to avoid and recover the transfer of stock  
10 to Dodson under 11 U.S.C. §§ 544(b), 548, and 550, and California  
11 Civil Code §§ 3439-3439.12. Id. Ex. A ("Assignment Agreement").  
12 YKF then brought suit against Dodson.

13 **B. Dodson's Counterclaim**

14 While Popov's personal bankruptcy proceedings were ongoing,  
15 Dodson and YKF entered arrangements to repay debts that Smart  
16 Alec's and Popov owed to YKF. Dodson Answer at 7-8. These  
17 arrangements culminated in a Closing Agreement, dated March 12,  
18 2007, involving a redemption of shares held by YKF, in  
19 consideration for the payment of obligations of Smart Alec's and  
20 Popov to YKF. Id.

21 Upon filing her answer to YKF's complaint for fraudulent  
22 conveyance, Dodson asserted a contract-based counterclaim against  
23 YKF. Id. She alleges that YKF delayed the closing of the Closing  
24 Agreement in bad faith, thereby causing her to pay approximately  
25 \$90,000 more than she would have paid if YKF had acted in good  
26 faith. Id. Dodson demanded a jury trial, and did not consent to  
27 a jury before the Bankruptcy Court. Adv. Docket No. 24

1 ("Certification for Withdrawal"). The case was thereafter  
2 transferred to this Court. Id.

3 **C. Triano's Intervention**

4 Triano had previously provided legal services for Popov, and  
5 also claims a security interest in the shares that are disputed in  
6 YKF's fraudulent conveyance claim. Adv. Docket No. 12 ("Motion to  
7 Intervene"). Triano alleges an agreement between Popov and Triano  
8 from 2002 providing him with a derivative interest in the shares.  
9 Id. at 2. On August 11, 2008, this Court granted Triano's Motion  
10 to Intervene. See Docket No. 20.

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12 **III. LEGAL STANDARD**

13 **A. Motion to Strike Dodson's Jury Demand**

14 The Seventh Amendment protects a party's right to a trial by  
15 jury. Parties are entitled to a trial by jury for issues that are  
16 legal in nature, but not for issues that are equitable in nature.  
17 See Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340,  
18 347-48 (1998). The Court may strike a jury demand if it finds  
19 that on some or all of the issues there is no federal right to a  
20 jury trial. See Fed. R. Civ. P. 12(f), 39(a)(2).

21 **B. Alternative Motion to Bifurcate**

22 Under Rule 42(b) of the Federal Rules of Civil Procedure, the  
23 Court may, "for convenience, to avoid prejudice, or expedite and  
24 economize, . . . order a separate trial of one or more separate  
25 issues [or] counterclaims . . . ." Fed. R. Civ. P. 42(b).

26 **C. Motion for Preliminary Injunction**

27 To be entitled to a preliminary injunction, the plaintiff  
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1 "must establish that he is likely to succeed on the merits, that  
2 he is likely to suffer irreparable harm in the absence of  
3 preliminary relief, that the balance of equities tips in his  
4 favor, and that an injunction is in the public interest." Winter  
5 v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 374 (2008).

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7 **IV. DISCUSSION**

8 **A. Motion to Strike**

9 YKF moves to strike Dodson's demand for a jury trial of both  
10 YKF's claims for fraudulent conveyance and Dodson's contract-based  
11 counterclaim. Dodson opposes the Motion to Strike, including  
12 YKF's alternative motion to bifurcate. Dodson Opp'n at 1. Triano  
13 does not oppose the motion to strike, but opposes the motion to  
14 bifurcate. Triano MTS Opp'n at 1.

15 **1. YKF's Fraudulent Conveyance Claims**

16 YKF is seeking recovery under 11 U.S.C. §§ 544(b) and 548,  
17 and California Civil Code §§ 3439-3439.12. Specifically, YKF is  
18 seeking to recover the shares in Smart Alec's that were  
19 transferred from Popov to Dodson in the allegedly-fraudulent  
20 conveyance.

21 For suits brought to enforce statutory rights, the Seventh  
22 Amendment protects the right to trial by jury to the extent that  
23 the action is "analogous to common-law causes of action ordinarily  
24 decided in English law courts in the late 18th century, as opposed  
25 to those customarily heard by courts of equity or admiralty."  
26 Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 42 (1989)  
27 (citations omitted). The Court must apply a three-step analysis

1 to determine whether a statutory cause of action requires a jury  
 2 trial. Id. First, the Court must "compare the statutory action  
 3 to 18th-century actions brought in the courts of England prior to  
 4 the merger of the courts of law and equity." Id. Second, the  
 5 Court must "examine the remedy sought and determine whether it is  
 6 legal or equitable in nature." Id. If these two factors  
 7 "indicate that a party is entitled to a jury trial," then the  
 8 Court will "decide whether Congress may assign and has assigned  
 9 resolution of the relevant claim to a non-Article III adjudicative  
 10 body that does not use a jury as factfinder." Id.

11 Under the first step, the Court examines the nature of YKF's  
 12 claims for the fraudulent conveyance of shares. YKF contends that  
 13 its claims are equitable, and Dodson does not challenge this  
 14 characterization. Mot. to Strike at 6; Dodson Opp'n. Courts have  
 15 concluded that claims for fraudulent conveyance of property other  
 16 than money, such as real property or intangibles, are equitable in  
 17 nature.<sup>2</sup> See In re Babcock & Wilcox Co., No. 01-1467, 2001 U.S.  
 18 Dist. LEXIS 9660, at \*16-17 (E.D. La. June 25, 2001) (finding  
 19 fraudulent conveyance action to be equitable because its subject  
 20 matter was shares). The Court concludes that YKF's claim is

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 22 <sup>2</sup> The Supreme Court considered the nature of a claim for  
 23 fraudulent conveyance of money (rather than stock) in  
 24 Granfinanciera, and it concluded that the claim was legal. Id. at  
 25 36. The Court predicated this conclusion on the fact that "the  
 26 present action [is] for *monetary* relief," and because the Trustee  
 27 "sought the recovery of a fixed sum of money." Id. at 42, 45  
 28 (emphasis in original). Later courts have concluded that this  
 ruling was limited to fraudulent conveyance of money and does not  
 apply to other subject matter. See, e.g., United States v. Combs,  
 No. 96-5050, 1996 U.S. Dist. LEXIS 17187, \*3-4 (E.D. Cal. Oct. 28,  
 1996).

1 equitable in nature.

2 The Court next considers the nature of YKF's requested  
3 relief. YKF requests that the transfer be set aside, that a  
4 constructive trust be declared, and the shares be transferred to  
5 YKF. YKF Complaint at 6. An action to set aside a fraudulent  
6 conveyance is traditionally equitable. See, e.g., Hyde Properties  
7 v. McCoy, 507 F.2d 301, 305 (6th Cir. 1974). However, Dodson  
8 contends that YKF's request "[f]or compensatory damages according  
9 to proof" renders YKF's request for relief equitable, rather than  
10 legal. Dodson Opp'n at 3. This alternative prayer does not  
11 convert YKF's requested relief into a legal request. Whitlock v.  
12 Hause, 694 F.2d 861, 865 (1st Cir. 1982) (rejecting demand for  
13 jury trial based on "catch all" prayer, where "damages request was  
14 intended to take effect only if the earlier requested equitable  
15 relief of reconveyance was unavailable"); Babcock & Wilcox Co.,  
16 2001 U.S. Dist. LEXIS 9660, at \*18 (request "for alternative  
17 monetary relief in an amount equal to the value of the assets does  
18 not convert the claim to one at law"). The Court concludes that  
19 the relief sought by YKF is equitable in nature. Because the  
20 Court concludes that YKF's claims, as well as the relief it seeks,  
21 are equitable in nature, it need not consider the third factor in  
22 Granfinanciera. 492 U.S. at 42.

23 Dodson contends that she is entitled to a trial by jury  
24 because she did not submit a claim for relief with the Bankruptcy  
25 Court. Dodson Opp'n at 3. This argument misapprehends the basis  
26 for YKF's Motion to Strike. YKF is not arguing that Dodson has,  
27 by submitting a claim or by seeking the res of the bankruptcy

1 estate, waived her right to a jury. Instead, YKF's Motion to  
2 Strike rests primarily on the equitable nature of the claims in  
3 its complaint and the relief that it is seeking. This Court finds  
4 that the nature of YKF's complaint is equitable, and GRANTS YKF's  
5 motion to strike Dodson's jury request as to the complaint.

6 2. Dodson's Counterclaim

7 Dodson has raised a contract-based counterclaim and is  
8 seeking damages against YKF. Contract claims for damages are a  
9 traditional example of suits at law that entitle the parties to  
10 jury trials. See e.g., Atlas Roofing Co. v. Occupational Safety &  
11 Health Review Comm'n, 430 U.S. 442, 458 (1977) ("[S]uits for  
12 damages for breach of contract, for example, were suits at common  
13 law with the issues of the making of the contract and its breach  
14 to be decided by a jury.").

15 YKF contends that Dodson effectively waived her right to a  
16 jury trial by raising a permissive counterclaim in response to a  
17 complaint that sounds in equity. YKF cites Horowitz v. New York  
18 Life Ins. Co., 80 F.2d 295, 301 (9th Cir. 1935) for the  
19 proposition that raising a permissive counterclaim waives a  
20 counterclaimant's right to a jury trial. However, Horowitz  
21 predates the Federal Rules of Civil Procedure, and this rule has  
22 not survived the merger of law and equity. See, e.g., Beacon  
23 Theaters, Inc. v. Westover, 359 U.S. 500, 505-07 (1959) (rejecting  
24 rule because "[u]nder the Federal Rules the same court may try  
25 both legal and equitable causes in the same action"); Morrison-  
26 Knudsen Co., Inc. v. Wiggins, 13 F.R.D. 304, 305 (D. Alaska 1952)  
27 ("Since the adoption of the Federal Rules of Civil Procedure, . . .  
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1 . the Federal Courts have held in a number of instances that trial  
2 of legal issues so raised by the defendant should be tried by  
3 jury." (citations omitted)); see also Cache, Inc. v. Scitech Med.  
4 Prods., Inc., No. 89-4028, 1990 U.S. Dist. LEXIS 3830, at \*5-6 (D.  
5 Kan. Mar. 19, 1990) (rejecting rule).

6 YKF cites several cases to imply that the modern rule is that  
7 only a counterclaimant who raises a compulsory counterclaim does  
8 not waive his or her right to a jury. See e.g., In re Lloyd's  
9 Secs., Inc., 156 B.R. 750, 754 (E.D. Penn. 1993); In re Allied  
10 Cos., Inc., 137 B.R. 919, 924 (S.D. Ind. 1991). These cases  
11 suggest, at most, that a counterclaim raised against a debtor or a  
12 bankrupt estate may, in some circumstances, be interpreted as a  
13 waiver of a jury trial because of the equitable nature of the  
14 bankruptcy process. However, Dodson is not counterclaiming  
15 against the bankruptcy estate; she is raising a contract-based  
16 counterclaim against YKF, which arose before YKF had even  
17 purchased the right to bring a separate suit on behalf of the  
18 Trustee. Dodson's counterclaim is therefore not against YKF as a  
19 trustee, and this case law is not relevant.

20 YKF's argument that Dodson's counterclaim is permissive,  
21 rather than compulsory, is not persuasive. YKF has cited no case  
22 that suggests that this distinction is a basis for denying a jury  
23 trial under the modern judicial system. Cases that reject the  
24 waiver rule generally do not premise their conclusion on whether  
25 the counterclaim is permissive or compulsory. See e.g., Beacon  
26 Theaters, 359 U.S. at 505-07. This distinction is inconsistent  
27 with the merger of law and equity, and has been rejected by the  
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weight of legal scholarship. See, e.g., 8 James Wm. Moore et al., Moore's Federal Practice ¶ 38.43 at 38-206 (3d ed. 2009) ("[N]o waiver of jury trial results from the interposition of a 'legal' counterclaim whether compulsory or permissive, in a civil action which is essentially equitable."); 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure 2305 at 70 (2nd ed. 1994) ("The same result should be and is reached for any counterclaim, whether compulsory or permissive."). The Court therefore concludes that Dodson did not waive her right to a jury trial by asserting a legal counterclaim in an equitable action. The Court DENIES YKF's motion to strike Dodson's jury demand with respect to her counterclaim.

**B. Alternative Motion to Bifurcate**

YKF moves to bifurcate so as to separate the proceedings related to its fraudulent conveyance claims from the proceedings related to Dodson's counterclaim. Mot. to Strike at 2. YKF argues that bifurcation will lead to two advantages. Id. at 10. First, it will be more efficient, because YKF's equitable claim can be tried separately. Id. Second, because there is little factual overlap between YKF's claims and Dodson's counterclaim, trying these two issues together could confuse a jury. Id.

Rule 42(b) of the Federal Rules of Civil Procedure "merely allows, but does not require, a trial court to bifurcate cases 'in furtherance of convenience or to avoid prejudice.'" Hangarter v. Provident Life & Accident Ins. Co., 373 F.3d 998, 1021 (9th Cir. 2004) (citations omitted). The Court finds that there is no compelling reason to bifurcate. The parties to both claims are

the same, and the Court finds that these matters will be most efficiently dealt with before a single court in a single action. The Court DENIES YKF's alternative motion to bifurcate.

### C. PRELIMINARY INJUNCTION

YKF moves to enjoin Dodson from transferring her interest in the shares at issue. MPI at 1. YKF also requests that Dodson be required to notify Summit Bank of the pendency of this action. MPI at 6. This is because Summit Bank "allegedly has a security interest in the Shares and Smart Alec's assets," which it acquired after Dodson guaranteed a loan from Summit Bank. Id.<sup>3</sup>

Dodson is not opposed to the injunction, but denies that YKF is likely to prevail on the merits. Dodson Non-Opp'n at 1. Triano objects only insofar as the injunction would require a finding that YKF is likely to succeed not only as to Dodson, but also over Triano's claim to the shares. Triano PI Opp'n at 1. Because it is not necessary to weigh Triano's claim at this time, the preliminary injunction is effectively unopposed.

To be entitled to a preliminary injunction, YKF must first show a likelihood of success on the merits, or that it has at least "a fair chance of success." Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc). YKF

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<sup>3</sup> YKF has also filed a Request for Judicial Notice, Docket No. 35 ("RJN"). These documents consist of filings and proceedings before the Bankruptcy Court of the Northern District of California. The Court may take judicial notice of proceedings and filings in other courts. See United States ex rel. Robinson Racheria Citizens Council v. Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). The Court GRANTS YKF's request for judicial notice. Dodson suggested that Summit Bank may have a security interest during trial in the bankruptcy proceedings. RJN, Ex. 3, at 104:9-105:4, 110:19-111:9.

1 contends that Popov's transfer of shares to Dodson was fraudulent.  
2 Whether YKF can establish this claim will depend on Popov's state  
3 of mind, i.e., whether he had an actual intent to hinder, delay,  
4 or defraud a creditor. See e.g., In re Cohen, 199 B.R. 709, 716  
5 (B.A.P. 9th Cir. 1996).

6 YKF points to several facts that could establish Popov's  
7 fraudulent intent. YKF alleges that Popov and Dodson concealed  
8 the transfer of stock from the President and Board member of Smart  
9 Alec's for over a year (assuming that the transfer took place in  
10 April of 2004), or that they backdated the transfer (assuming that  
11 it took place in August of 2005). MPI at 9-10. Popov had  
12 allegedly incurred significant debts to both YKF and Triano. Id.  
13 at 10-11. Finally, the transfer was made to someone with whom  
14 Popov shared a close relationship (i.e., his then-girlfriend  
15 Dodson), and Popov allegedly remained active in the business after  
16 it was transferred (again, assuming a transfer in April of 2004).  
17 Id. at 9. Read together, these factors suggest that YKF can  
18 establish a plausible claim of fraudulent transfer. See Acequia,  
19 Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 806 (9th Cir.  
20 1994) (listing "unmanageable indebtedness," and a "special  
21 relationship between the debtor and the transferee," and retention  
22 of the property transferred, as potential badges of fraud). The  
23 Court concludes that YKF has established that it has a sufficient  
24 likelihood of success for the purposes of its motion for  
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1 preliminary injunction.<sup>4</sup>

2 YKF must next establish that irreparable injury is likely in  
3 the absence of an injunction. See Winter, 129 S. Ct. at 374. YKF  
4 is seeking to recover shares. YKF could suffer irreparable harm  
5 if Dodson were to transfer the shares to a bona fide third party.  
6 See DLJ Mortg. Capital, Inc. v. Kontogiannis, 594 F. Supp. 2d 308  
7 (E.D.N.Y. 2009) (finding irreparable harm where defendant could  
8 convey properties in dispute to a bona fide purchaser). Recovery  
9 of these shares could not be replaced by a monetary reward,  
10 because these shares are not easily fungible and are difficult to  
11 monetize. Furthermore, there is evidence on the record that at  
12 least one entity that is not a party to this litigation, Summit  
13 Bank, may possess a security interest in the claim. RJN Ex. 3 at  
14 104:9-105:4, 110:19-111:9. The Court finds this to be a  
15 sufficient basis for establishing a likelihood of irreparable  
16 harm.

17 Under the third prong, the Court weighs the balance of  
18 equities between the parties. Given the unopposed nature of YKF's  
19 motion for preliminary injunction to preserve the status quo, the  
20 Court finds that the balance of hardships tips in favor of YKF.  
21 YKF risks losing access to the shares in the absence of an  
22 injunction, and Dodson has presented no countervailing interest.  
23 Finally, the Court notes that the preliminary injunction does not  
24 burden the public interest. The Court GRANTS YKS's Motion for

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26 <sup>4</sup> In doing so, the Court offers no opinion regarding the  
27 respective claims to the contested shares as between Triano and  
28 YKF.

Preliminary Injunction.

**V. CONCLUSION**

For the reasons discussed above, this Court hereby:

1. GRANTS YKF's motion to strike Dodson's jury demand with respect to the claims brought by YKF in its complaint;
2. DENIES YKF's motion to strike Dodson's jury demand with respect to the counterclaim raised by Dodson;
3. DENIES YKF's alternative motion to bifurcate; and
4. GRANTS YKF's motion for preliminary injunction.

The Court hereby orders, during the pendency of this action, Dodson, her employees, agents, and representatives, and all persons acting with her or on her behalf must not sell, transfer, or encumber the shares that she received pursuant to the Share Purchase Agreement between Popov and Dodson dated April 18, 2004, or any interest therein, or any assets of Smart Alec's outside the ordinary course of business. The Court further orders Dodson to notify Summit Bank of the pendency of this action and the issuance of this injunction.

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1 The parties are also ordered to participate in a mandatory  
2 settlement conference before a Magistrate Judge. Counsel will be  
3 advised of the date, time, and place of the conference by notice  
4 from the assigned Magistrate Judge. A Further Status Conference  
5 will be held on September 9, 2009, at 10:00 a.m. in Courtroom #1.

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7 IT IS SO ORDERED.

8  
9 April 21, 2009

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11 UNITED STATES DISTRICT JUDGE  
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